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In The
Supreme Court of the United States

McCREARY COUNTY, KENTUCKY, et al.,

Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE, THOMAS MORE LAW CENTER, IN SUPPORT OF PETITIONERS

EDWARD L. WHITE III
Counsel of Record
THOMAS MORE LAW CENTER
24 Frank Lloyd Wright Dr.
P.O. Box 393
Ann Arbor, Michigan 48106
734-827-2001
Counsel for Amicus Curiae, Thomas More Law Center

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. THE CONCEPT OF "UNCONSTITUTIONAL TAINT" EITHER CARRIES THE PURPOSE PRONG BEYOND ITS USEFULNESS OR UNDERMINES THE ABILITY OF STATE ACTORS TO REMEDY VIOLATIONS OF THE CONSTITUTION	3
A. The Sixth Circuit's notion of "unconstitutional taint" distorts *Lemon's* purpose prong by presuming unconstitutional purpose instead of deferring to the government's articulated purpose in the absence of a sham	4
B. To develop the theory of "unconstitutional taint," the Sixth Circuit expanded the limited applicability of *Santa Fe v. Doe* well beyond that case's actual scope	9
II. GOVERNMENTS MAY ACT TO REMEDY THEIR IMPERMISSIBLE PURPOSES WITHOUT INCURRING THE "UNCONSTITUTIONAL TAINT" SUGGESTED BY THE SIXTH CIRCUIT	11
A. When examining the constitutionality of a particular government act, courts examine the purpose underlying each government act individually	12

TABLE OF CONTENTS – Continued

Page

B. Given the difficulty of Establishment Clause analysis, courts routinely allow governments to modify conduct to comply with the Constitution without having their originally suspect purposes held against them 15

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) 5, 16

ACLU v. McCreary Cty., 354 F.3d 438 (6th Cir. 2003) ..... *passim*

ACLU v. McCreary Cty. 361 F.3d 928 (6th Cir. 2004) 20

ACLU v. Schundler, 168 F.3d 92 (3rd Cir. 1998) 13, 14

Adland v. Russ, 307 F.3d 471 (6th Cir. 2002) 19

Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991) 17

Chaudhuri v. Tennessee, 130 F.3d 232 (6th Cir. 1997) 5

County of Allegheny v. ACLU, 492 U.S. 573 (1989) .. 12, 13, 16

Doe v. Small, 964 F.2d 611 (7th Cir. 1992) 20

Edwards v. Aguillard, 482 U.S. 578 (1987) 5, 7

Granzeier v. Middleton, 173 F.3d 568 (6th Cir. 1999) 16, 17, 18

Lemon v. Kurtzman, 403 U.S. 602 (1971) 2, 3, 4, 5, 14

Lynch v. Donnelly, 465 U.S. 668 (1984) 5, 6, 16

McGowan v. Maryland, 366 U.S. 420 (1961) 16

Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995) 17

Mueller v. Allen, 463 U.S. 388 (1983) 5

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) 4, 5, 9, 10

Stone v. Graham, 449 U.S. 39 (1980) 8, 11

Wallace v. Jaffree, 472 U.S. 38 (1985) 5

TABLE OF AUTHORITIES – Continued

Page

RULES

Sup. Ct. R. 29.6 1

Sup. Ct. R. 37.2(a) 1

Sup. Ct. R. 37.6 1

INTEREST OF AMICUS CURIAE

The Thomas More Law Center is a national, non-profit public interest law firm based in Ann Arbor, Michigan. The Thomas More Law Center is dedicated to defending and promoting the religious freedom of Christians, including the display of the Ten Commandments on public property, time-honored family values, and the sanctity of human life.[1]

The Thomas More Law Center accomplishes these goals on behalf of the citizens of the United States through education, litigation, and related activities. As part of its litigation efforts, the Thomas More Law Center has represented government entities in defense of lawsuits seeking to remove Ten Commandments monuments from public property, and the Thomas More Law Center has submitted amicus curiae briefs in this Court and in the United States Court of Appeals for the Sixth, Seventh, and Eleventh Circuits in support of the display of such monuments on public property. Accordingly, the Thomas More Law Center has acquired an expertise in this area of the law, which will be of assistance to this Court in deciding this case.

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[1] The parties to this litigation have consented to the filing of this brief, and letters indicating such consent have been filed with this Court. Sup. Ct. R. 37.2(a). No counsel for a party authored this brief in whole or in part, and no person or entity aside from the Thomas More Law Center has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. The Thomas More Law Center has no parent corporation and no stock. Sup. Ct. R. 29.6.

The Thomas More Law Center appears as amicus curiae in support of petitioners and urges this Court to reverse the judgment below.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Sixth Circuit found that a display containing only the Ten Commandments imprinted the defendant's "purpose" from the beginning with an "unconstitutional taint." It thereby created a new rule for Establishment Clause review that allows a government's *past* action to control the analysis of a *current* action's constitutionality. In so doing, the Sixth Circuit shifted the standard of *Lemon's* purpose prong. It ignored this Court's rule that government action motivated in part by a religious purpose may still satisfy the purpose prong. It further ignored this Court's rule that courts should accept a government's articulated purpose unless evidence clearly indicates a sham. Further, the Sixth Circuit's "unconstitutional taint" doctrine ignores this Court's caution against second-guessing legislative purposes. In contrast to the Sixth Circuit's approach, the proper inquiry is into the purpose of the *current* display and whether the secular purpose stated by the government is more than a mere sham. By interpreting the purpose prong to include an "unconstitutional taint" on *subsequent* conduct, the Sixth Circuit wrongly precludes governments from having an opportunity to turn unconstitutional behavior into constitutional behavior.

ARGUMENT

In finding that the government possessed an improper purpose for creating the "Foundations of American Law and Government Display," the Sixth Circuit affirmed the district court's finding that the *original* display, containing only the Ten Commandments, "imprinted the defendants' purpose, from the beginning, with an unconstitutional taint." *ACLU v. McCreary Cty.*, 354 F.3d 438, 457 (6th Cir. 2003).

Although the Sixth Circuit held that the evolution of the display did not *conclusively* reveal an unconstitutional purpose for the current display, the Sixth Circuit did find that it "strongly indicated" and "patently evidence[d]" the government's current purpose. *Id.* at 458. Regardless of the exact weight given to the government's prior display in determining its current purpose, the very notion that prior conduct results in a continuing permeation of unconstitutionality is contrary to the proper inquiry into the government's actual purpose under *Lemon*.

I. THE CONCEPT OF "UNCONSTITUTIONAL TAINT" EITHER CARRIES THE PURPOSE PRONG BEYOND ITS USEFULNESS OR UNDERMINES THE ABILITY OF STATE ACTORS TO REMEDY VIOLATIONS OF THE CONSTITUTION.

The phrase "unconstitutional taint" has long been a part of constitutional law cases. The Sixth Circuit, however, injected a novel interpretation by juxtaposing that concept with the purpose prong of the *Lemon* test in Establishment Clause cases. It did this largely by reading

this Court's decision in *Santa Fe* to mean more than this Court had intended.

A. The Sixth Circuit's notion of "unconstitutional taint" distorts *Lemon's* purpose prong by presuming unconstitutional purpose instead of deferring to the government's articulated purpose in the absence of a sham.

By allowing a government's *past* action to control the analysis of a *current* action's constitutionality, the Sixth Circuit shifted the standard. Its view requires a government not simply to articulate a *current* constitutional purpose, but to absolve itself from *ever* possessing a religious purpose. The Sixth Circuit's use of the "unconstitutional taint" concept presupposes present unconstitutionality, unless enough time has passed to remove the stigma. In so doing, the Sixth Circuit has refused to accept the government's articulated purpose and has treated the stated purpose with automatic suspicion simply because the actor "has a past." Such a requirement does not comport with this Court's purpose prong analysis.

The purpose prong of the *Lemon* test requires that a challenged state action have a secular purpose.[2] *Lemon v.*

[2] The *Lemon* test has three prongs: "First, the state must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612-13. Whether the display in question here satisfies *Lemon*'s other two prongs does not factor into the alleged applicability of prior conduct in determining current constitutional purpose.

(Continued on following page)

Kurtzman, 403 U.S. 602, 612-13 (1971). In analyzing whether a government act is constitutional with regard to its purpose, a government act that is motivated in part by a religious purpose may satisfy the purpose prong, *see, e.g.*, *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 296-303 (1963) (Brennan, J., concurring), but will not satisfy it if the act "is entirely motivated by a purpose to advance religion." *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). As this Court has explained, a "governmental action [will be invalidated] on the ground that a secular purpose was lacking, . . . only when [this Court] has concluded there was no question that the statute or activity was motivated wholly by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984).

Indeed, courts give government considerable deference in articulating the purpose for its actions. Unless the articulated secular purpose is a sham, the purpose prong is satisfied. *See Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987). In discerning whether the articulated purpose is genuine, courts have "no license to psychoanalyze" government actors and must be "cautious about attributing unconstitutional motives to state officials." *Chaudhuri v. Tennessee*, 130 F.3d 232, 236 (6th Cir. 1997); *see Wallace*, 472 U.S. at 74; *Mueller v. Allen*, 463 U.S. 388, 394 (1983).

Thus, courts are instructed to accept a government's articulated purpose unless evidence clearly indicates a

Justices of this Court have criticized *Lemon*, and the time has come for this Court to discard the *Lemon* test. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319-20 (2000) (Rehnquist, CJ., joined by Scalia and Thomas, JJ., dissenting) (explaining that "*Lemon* has had a checkered career in the decisional law of this Court" and collecting Supreme Court opinions criticizing *Lemon*).

sham. The Sixth Circuit's concept of "unconstitutional taint," however, does not defer to the government's stated purpose for a challenged act. Instead, it second-guesses the government's current purpose based on a prior allegedly unconstitutional purpose. Any similar conduct occurring within a short time of the original activity is automatically suspect. It then falls on the government not only to articulate reasons for its current conduct, but also to prove that it has rid itself of its past motives. Placing the government in this defensive position and presupposing unconstitutionality, as the Sixth Circuit has done, does not defer to the government's stated purpose, thus falling far short of the standards set forth by this Court.

Numerous cases illustrate how the purpose test is to be applied when determining whether a valid secular purpose exists. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), this Court upheld the constitutionality of a city display that included a crèche. This Court reversed the district and circuit courts, which had held that the city's display lacked a secular purpose because of the religious nature of the crèche. *Id.* at 680. This Court affirmed the "legitimate secular purposes" of celebrating Christmas and its historical roots. *Id.* at 681. Thus, even though displaying the crèche may have had a religious motive, this Court upheld the display because the government had articulated legitimate secular purposes. *Id.*

Under *Lynch*, then, even though a religious purpose may exist for a certain display, as long as the display is not "motivated wholly by religious considerations," the display is constitutional. *Id.* at 680. This analysis illustrates the folly of applying "unconstitutional taint" to a government display. "Unconstitutional taint" inflates the significance of a previous religious purpose by focusing on it rather

than on the current purpose, and it allows the government no deference to its articulated purpose, finding a sham hiding beneath every subsequently-stated purpose.

The concept of "unconstitutional taint," moreover, ignores this Court's caution against second guessing legislative purposes and misapplies this Court's direction to ignore sham secular purposes. This Court analyzed Louisiana's "Creationism Act" in *Edwards v. Aguillard*, 482 U.S. 578 (1987). There, the Court looked beyond the Act's stated purpose of "protect[ing] academic freedom." *Id.* at 585-89. The text of the statute forbade public schools from teaching evolution unless "creation science" was also taught. *Id.* at 581. Conducting its purpose prong inquiry, this Court recognized its normal deference "to a State's articulation of a secular purpose," but affirmed the court's role in determining "that the statement of such purpose [is] sincere and not a sham." *Id.* at 586-87. This Court viewed the articulated purpose with understandable skepticism, noting that "appellants have not identified any secular purpose that was not fully served by [existing state law] before the enactment of [the statute in question]." *Id.* at 588.

In short, this Court used the text of the Creationism Act to discern that the alleged secular purpose did not align with the actual effect of the act. While claiming to promote academic freedom, the Act actually stifled teachers' freedom to develop the best curriculum possible for their classrooms by dictating that evolution could only be taught in conjunction with creationism. The "sham" uncovered by the Court appeared on the face of the challenged policy.

These facts do not parallel the alleged "sham" purpose articulated by the government actors in *McCreary*. Here, the Sixth Circuit could not rely on the contents of the current display to counter the actors' articulated secular purpose. Instead, the Sixth Circuit short-circuited the analysis by holding the actors' *original* conduct against them when their later conduct was challenged. The Sixth Circuit adopted the district court's rationale that the "defendants' overall purpose is religious in nature: to display the Ten Commandments." *McCreary Cty.*, 354 F.3d at 457. The analysis begins with the premise that the original display was "erected in violation of the Supreme Court's clear ruling in *Stone*." *Id.* Based on the district court's belief that the original conduct openly defied Establishment Clause jurisprudence, the district court held that the first display "imprinted the defendants' purpose, from the beginning, with an unconstitutional taint. . . ."[3] *Id.*

[3] The district court's finding that a religious motive existed from the beginning is conjectural in light of the fact that *Stone v. Graham*, 449 U.S. 39 (1980), dealt exclusively with legislation requiring the posting of the Ten Commandments in every classroom. The constitutionality of courthouse representations, as in this case, has not been expressly addressed in this Court's precedent.

Given the plethora of Ten Commandments postings in courtrooms across the country, coupled with this Court's recognition of religion's unique influence in the school setting, the government's actions here appear less defiant. Interpreting the government's conduct in another light, then, places it not necessarily with an exclusively religious – and therefore unconstitutional – purpose. Indeed, it illumines the basis for the government to change its displays in accordance with what it believed the court required for a constitutional exhibit. Such an explanation would eliminate the existence of any purpose that could taint future displays.

The Sixth Circuit, thereby, imprinted a religious purpose on the *original* display and then carried that singular purpose through to the *current* display without any basis for disregarding the articulated secular purposes for the *new* display. By interpreting the purpose prong to include an "unconstitutional taint" on subsequent conduct, the Sixth Circuit has denied government the opportunity to turn unconstitutional behavior into constitutional behavior. If actions are found unconstitutional because at one point the actor allegedly possessed an unconstitutional motive, no unconstitutional action could ever be cured. The Sixth Circuit's rule is wrong and should be rejected.

B. To develop the theory of "unconstitutional taint," the Sixth Circuit expanded the limited applicability of *Santa Fe v. Doe* well beyond that case's actual scope.

The Sixth Circuit relied heavily on *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), to defend its examination of the evolution of the Ten Commandments display to determine the government's purpose. *See McCreary Cty.*, 354 F.3d at 455-58. But the Sixth Circuit interpreted *Santa Fe* to stand for a proposition well beyond how this Court used the state actor's past conduct. In *Santa Fe*, this Court held that a student-led, student-initiated invocation before football games violated the Establishment Clause because the invocation was public speech at a government-sponsored school event and thereby coerced student participation in a religious activity. During the course of litigation, the school district had implemented several changed policies regarding the practice. *Santa Fe*, 530 U.S. at 294-99 (tracing the history of the practice). The first policy required an election to determine whether the

invocation should occur and another election to select the individual to give the invocation. *Id.* at 297-98. The revised policy changed the practice's description from "invocation" and "prayer" to "invocation" or "statement" or "messages." *Id.* at 298.

This Court recognized that the most current policy violated the Constitution on its face. *Id.* at 314. In addition, it noted that the "solemnization" proposed by the school district could most assuredly only occur in the form of a prayer. *Id.* at 308-09, 314-17. This Court also noted that the new policy was simply "a continuation of the previous policies[,] dramatically illustrated by the fact that the school did not conduct a new election, pursuant to the current policy, to replace the results of the previous election, which occurred under the former policy." *Id.* at 309. "This history," this Court concluded, "indicates that the District intended to preserve the practice of prayer before football games." *Id.*

The policy changes by the school district in *Santa Fe* were relevant to determining the purpose of the last policy simply because the identical conduct – student-led invocations before football games – was under investigation throughout the course of litigation. In contrast, the Ten Commandments display in the instant case underwent substantial substantive changes during the course of litigation. Far from being the same practice under a different name, the Ten Commandments display evolved from a single copy of the Ten Commandments to a collection of secular and religious historical and legal documents (the contents of which underwent two changes). In *Santa Fe*, the government actor made no effort to enforce the new policy by failing to hold new elections; the school district only made "cosmetic alterations" to the actual contested

practice. In contrast, the government actors in this case fundamentally altered the nature of the exhibit. Its current conduct is not the same allegedly unconstitutional conduct that it first undertook.

The mere presence of the Ten Commandments in each of the displays does not indicate a continuing constitutionally-suspect purpose. By the Sixth Circuit's own admission, and based on this Court's discussion in *Stone v. Graham*, 449 U.S. 39 (1980), the Ten Commandments can be displayed in a constitutional manner. *McCreary Cty.*, 354 F.3d at 448-49, 459 ("*Stone* established no *per se* rule that displaying the Ten Commandments in an educational setting is unconstitutional."). Thus, the Ten Commandments continuing presence in the display cannot in itself be the basis for investigating beyond the government's *current* stated purpose for the display. By suggesting that the government's original conduct taints every subsequent display, the Sixth Circuit has misdirected the proper inquiry into the government's purpose.

II. GOVERNMENTS MAY ACT TO REMEDY THEIR IMPERMISSIBLE PURPOSES WITHOUT INCURRING THE "UNCONSTITUTIONAL TAINT" SUGGESTED BY THE SIXTH CIRCUIT.

Rather than focus solely on the constitutionality of its present purpose, the Sixth Circuit's notion of "unconstitutional taint" requires a government to display a constitutional exhibit the first time around or forever be imprinted with the stigma of unconstitutional tendencies.

This Court, and other courts, have found that one display does not infect another. Further, governments

faced with the ambiguity of Establishment Clause jurisprudence should not be denied the freedom to take instruction from prior decisions to comport their conduct with the Constitution.

A. When examining the constitutionality of a particular government act, courts examine the purpose underlying each government act individually.

Prudence dictates that the purpose for government actions be analyzed independently for each government act. The case of *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), illustrates that an unconstitutional purpose underlying one act does not necessarily imprint a simultaneous act with the same impermissible purpose. Following the example established in *Allegheny*, the Third Circuit has separately analyzed the purpose underlying subsequent acts by the same government, and the Third Circuit does not allow an original unconstitutional purpose to alter the constitutionality of a subsequent display.

In *Allegheny*, this Court confronted two holiday displays found on public property in Pittsburgh. Located in a focal point of the Allegheny County Courthouse, the first display included a crèche, a banner reading "Gloria in Excelsis Deo!," poinsettias, a Christmas tree, and a plaque stating the name of the organization donating the display. *Id.* at 579-80. A majority of this Court held that this display violated the Establishment Clause. *Id.* at 621. The second display, located outside the City-County Building, depicted a large Christmas tree, Chanukah menorah, and a sign reading "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are keepers of the flame of liberty and our

legacy of freedom." *Id.* at 581-82. A majority found that the display was constitutional. *Id.* at 621. The two displays were analyzed separately and none of the justices suggested that because one display was unconstitutional, the other display was "tainted" by the same purpose. Instead, each display, and the purpose behind it, was analyzed in terms of its own content.

The Third Circuit, applying these principles in *ACLU v. Schundler,* 168 F.3d 92 (3rd Cir. 1999), spurned the argument that Jersey City's "prior history" should be taken into account when analyzing the city's purpose behind modifying a Christmas holiday display. For decades, Jersey City exhibited a holiday display that featured a menorah and a Christmas tree. *Id.* at 94-95. The district court permanently enjoined the display as a violation of the Establishment Clause. *Id.* at 95. After the injunction was ordered, Jersey City erected a modified display that included "not only a crèche, a menorah, and Christmas tree, but also large plastic figures of Santa Claus and Frosty the Snowman, a red sled, and Kwanzaa symbols on the tree." *Id.* at 95. The city also posted signs indicating that the display was "one of a series . . . put up by the City throughout the year to celebrate its residents' cultural and ethnic diversity." *Id.*

The plaintiffs had argued:

> Jersey City's addition of the secular symbols was "a ploy designed to permit continued display of the religious symbols." The suggestion seems to be that, even if Jersey City could have properly erected the modified display in the first place, the City's initial display, which was held to violate the Establishment Clause, showed that the city officials were motivated by a desire to evade

> constitutional requirements and that this motivation required invalidation of the modified display.

Id. at 105. Rejecting this contention, the Third Circuit stated,

> [t]he mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked "a secular legislative purpose," or that it was "intend[ed] to convey a message of endorsement or disapproval of religion."

Id. (internal citations omitted). The Third Circuit recognized that this Court's

> decisions regarding holiday displays have been marked by fine line-drawing, and therefore it is not easy to determine whether particular displays satisfy the Court's standards. Under these circumstances, the mere fact that city officials miscalculate and approve a display that is found by the federal courts to cross over the line is hardly proof of the officials' bad faith.

Id.

A similar minefield of constitutionality exists for many Establishment Clause cases, especially in interpreting *Lemon*'s purpose prong. This Court has frequently remarked upon the test's inherent shortcomings.[4] As such, a government's initial attempt to comport with the Constitution should not later be used against it when that initial attempt turns out to be contrary to the requirements of

[4] *See*, n. 2, *supra*.

the Establishment Clause. By using the concept of "unconstitutional taint," the Sixth Circuit has allowed one constitutionally-suspect purpose to eternally poison the purpose behind any similar subsequent display, a concept this Court must reject.

B. Given the difficulty of Establishment Clause analysis, courts routinely allow governments to modify conduct to comply with the Constitution without having their originally suspect purposes held against them.

This Court's jurisprudence has long recognized that governments initially acting unconstitutionally are free to change their conduct to conform to the Constitution. If the future conduct is challenged, courts focus solely on the constitutionality of that conduct and do not mark the actor with a scarlet stain of permanent suspicion. This fundamental legal principle has been incorporated into the Court's Establishment Clause jurisprudence. The cases supporting this principle are too numerous to detail, but a few examples are particularly insightful for demonstrating that "unconstitutional taint," in the words of the *McCreary* dissent, "offends common sense." *McCreary Cty.*, 354 F.3d at 477 (Ryan, J., dissenting). An actor may initially engage in unconstitutional conduct or with suspect purpose without having that fact used against him when analyzing the constitutionality of similar conduct or purpose.

On numerous occasions, a government has initiated a particular policy or conduct for wholly religious purposes, yet over time additional secular or historical reasons for continuing the practice emerged. As this Court has stated, governments may "retai[n] [a] la[w] for the permissible purpose of furthering overwhelmingly secular ends" even

though the original purpose was wholly religious in nature. *Schempp*, 374 U.S. at 263-64. For example, in *McGowan v. Maryland*, 366 U.S. 420 (1961), this Court upheld Sunday closure laws even though they were originally enacted for religious ends.

Similarly, in the holiday display cases, this Court did not examine the government's original purpose for displaying religious symbols in its Christmas displays. The relevant inquiry was the purpose for maintaining the practice during the *current* holiday season. Even though the original purpose may have been dominated by a religious purpose, because the current displays included important secular purposes, the displays passed Establishment Clause scrutiny. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

In each case, the original purpose did not taint the later articulated purposes. The same conduct originally practiced for religious purposes was upheld because the government now had a legitimate secular purpose. Despite the government's original religious purpose, this Court did not summarily dismiss a genuine, but only later articulated, secular purpose. If the purpose underlying the exact same conduct can be changed without poisoning that act, then the purpose behind changed conduct should not poison the modified act.

Several circuit courts examining modified displays have recognized that governments should be free to change their conduct and articulate legitimately secular reasons for acting even if their original purpose was constitutionally suspect. In the Sixth Circuit case of *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999), the

defendant government officials adopted holiday closing schedules that included Good Friday. On her own initiative, a government employee posted signs with an image of the crucifixion announcing that the building would be closed "for observance of Good Friday." *Id.* at 571.

Plaintiffs sued to have the signs removed, after which the government removed the Good Friday signs and replaced them with signs announcing a closing for the same day in honor of a "Spring Holiday." *Id.* The Sixth Circuit affirmed the secular purpose for closing government offices on Good Friday and allowed the closures to continue even though the original display indicated a religious purpose. *Id.* at 578. Dismissing the Good Friday observance's relevance to determining the purpose of the spring holiday closures, the court stated, "the fact that a particular closing was once constitutionally suspect does not prevent it from being reinstated in a constitutional form." *Id.* at 574; *id.* at 576 ("[W]e hold that the sign posted for several days . . . did not permanently taint the closings. . . . "); *see also Metzl v. Leininger*, 57 F.3d 618, 624 (7th Cir. 1995) (where despite affirming the unconstitutionality of a similar Good Friday closure law, the United States Court of Appeals for the Seventh Circuit expressed with confidence that the state could reinstate the exact same practice "by officially adopting a 'spring weekend' rationale for the law, in place of the governor's proclamation of a state *religious* holiday, or by moving to a system of local option for school districts"); *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991) (where the purpose for the holiday had become sufficiently secularized so as to pass constitutional muster despite any originally predominant religious purpose).

Analyzing *Granzeier*, it seems incredulous that the same circuit court would draw an antithetical conclusion in *McCreary*. Rather than find that "the fact that a particular [display] was once constitutionally suspect does not prevent it from being reinstated in a constitutional form," the Sixth Circuit stated in *McCreary* that the original display tainted the subsequent displays with a primarily religious purpose. The purpose analysis in *Granzeier* and *McCreary* should have been based on the same criteria. In both cases, religious motives may have driven the original posting, but in both cases a legitimate primary secular purpose undergirded later conduct.

In *Granzeier*, the Sixth Circuit declined to read anything into the fact that the government closing still occurred on Good Friday. Because there were valid secular reasons for the closing, the practice was held constitutional. The government achieved the same result (offices being closed on Good Friday) through constitutional means merely by changing the language of a sign. Consequently, the alleged unconstitutional sign had no bearing on the current practice under suspicion. This reasoning applies with even greater weight in *McCreary*, where not only the label given to a particular display changed, but also the very contents of the conduct in question expanded. Here, the result of the change fundamentally altered the nature of the conduct and made it constitutional. To be logically consistent then, if no "unconstitutional taint" applied to the government actor in *Granzeier*, none should apply against the actors in *McCreary*.

Before issuing its decision in *McCreary*, the Sixth Circuit had indicated that a previously unconstitutional purpose for a Ten Commandments display would not prevent a modified exhibit from being held constitutional.

In *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002), plaintiffs challenged a Kentucky legislative resolution relocating a monument inscribed with the Ten Commandments to a permanent site on the capitol grounds. The monument was to be part of a "historical and cultural display," but no other such monuments (with the exception of a floral clock) were yet on the premises. *Id.* at 477. Responding to the litigation, the legislature announced some of the intended accompanying monuments that would be added to the display. *Id.* Although the Sixth Circuit held that the monument standing by itself violated the Establishment Clause, it confidently expressed that "with careful planning and deliberation, and perhaps consultation with the plaintiffs, the Commonwealth can permissibly display the monument in question." *Id.* at 490.

The court in *Adland* encouraged the government to create a constitutional display that would comply with the Establishment Clause, but in *McCreary* the same court penalized the government for undertaking just such an endeavor. If any subsequent displays that would include the Ten Commandments would be forever tainted by the original display containing only the Ten Commandments monument, the *Adland* court never should have explained that a constitutional display was possible.

In effect, the purpose behind the original *McCreary* display and the *Adland* display – in the Sixth Circuit's view – was primarily religious. In *Adland*, then, the court suggests that the Ten Commandments may be displayed in a broader context. The *McCreary* decision analyzes just such a broader context – the challenged exhibit features a variety of historical and legal documents, both religious and secular. Yet in finding an improper purpose behind the new display, the Sixth Circuit in *McCreary* relies heavily

upon the original display and its alleged primary religious purpose. The Sixth Circuit's holding in *McCreary* ignores the clear precedent from this Court that a government's purpose for acting can evolve over time without penalty.

As Judge Boggs correctly stated in his dissent from the denial of a motion to rehear *McCreary*, "governmental bodies, like other litigants, should be free to take instruction from prior decisions or arguments, and thus to eschew, or move away from, practices that are contrary to law." *ACLU v. McCreary Cty.*, 361 F.3d 928, 933 (6th Cir. 2004). The notion of "unconstitutional taint" denies governments this basic right. The Sixth Circuit erred in holding that the government's original, allegedly unconstitutional purpose cast suspicion on the purpose underlying future displays that included the Ten Commandments.[5]

[5] The Seventh Circuit has also rejected the idea of "unconstitutional taint" and has recognized that unconstitutional conduct by one individual does not preclude the same conduct being conducted by another individual possessing a constitutional purpose. In *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992), litigation began when the City of Ottawa displayed sixteen paintings depicting the life of Christ in a city park. *Id.* at 612-15. The district court held that this action violated the Establishment Clause and permanently enjoined any future display of such paintings in the park. *Id.* at 617. In reversing the decision, the Seventh Circuit stated, "[the injunction] implies that once the government impermissibly endorses religious speech (e.g., the paintings), that particular speech becomes poisoned and no private party may thereafter express that view." *Id.* at 621. Citing numerous cases where the government has been allowed to cure previously unconstitutional behavior, the Seventh Circuit rejected the proposition that unconstitutional conduct permanently taints future conduct with the same unconstitutionality. *Id.*

CONCLUSION

For the above-stated reasons, and for the reasons stated in the petitioner's brief, this Court should reverse the judgment below.

Respectfully submitted,

EDWARD L. WHITE III
Counsel of Record
THOMAS MORE LAW CENTER
24 Frank Lloyd Wright Dr.
P.O. Box 393
Ann Arbor, Michigan 48106
(734) 827-2001
Counsel for Amicus Curiae,
Thomas More Law Center

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